No. 14,670

In the

United States Court of Appeals

For the Ninth Circuit

NORMAN BREELAND,	*Appellant,*
vs.	
SOUTHERN PACIFIC COMPANY and E. D. MOODY,	*Appellees.*

Brief for Appellees

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STATUTES

TEXTS

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APPELLEES' STATEMENT OF THE CASE

On December 22, 1953, appellant filed in the Superior Court of California a complaint (R. 8-11) against appellees, Southern Pacific Company (hereinafter referred to as "the Company") and E. D. Moody, as co-defendants, alleging that appellant, formerly employed as a brakeman by the Company, had been unjustly dismissed on September 5, 1950. It was claimed, in effect, that by such action the Company had violated the written collective bargaining agreement covering appellant's employment: i.e., the agreement between the employees represented by the Brotherhood of Railroad Trainmen, and the Company, effective December 16, 1939, as amended.

On petition of the Company, on December 16, 1953, the action was removed to the United States District Court for the Northern District of California, Southern Division (R. 13-16). Thereafter, on March 1, 1954, appellees presented to that Court their motion for summary judgment (R. 17), with a supporting affidavit by H. E. Eyler (R. 18-29). No opposing affidavit was filed by or on behalf of appellant. On March 3, 1954, the District Court, speaking through Judge Michael J. Roche, filed its order (without opinion) denying said motion (R. 29-30).

Answer was duly filed by appellees on March 11, 1954 (R. 30-34), presenting separate affirmative defenses as follows: (a) appellant's failure to state a claim upon which relief could be granted (R. 32); (b) appellant's failure to file his action within four years from the date of his dismissal, as required by the applicable provisions of the California Statute of Limitations (R. 32); and (c) appellant's failure to comply with the conditions required of him by the agreement upon which his action is based (R. 33).

Subsequent to the denial of appellees' motion for summary judgment referred to above (i.e., on August 10, 1954), this Court handed down its decision in *Barker v. Southern Pac. Co.*, 214 F.2d 918. In that case, the issue of law decided by this Court was identical with the principal issue of law presented here.

In view of the *Barker* decision, appellees presented on December 28, 1954, a second motion for summary judgment (R. 35), again duly supported by affidavit. Again appellant failed to file any opposing affidavit.

The facts developed by this record, including the complaint (R. 8-11), the answer (R. 30-34), and the supporting affidavit filed by appellees (R. 18-29), show without dispute the following: (1) appellant's employment was governed

by the collective bargaining agreement between the Company, and its employees represented by the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939 (hereinafter generally referred to as "the Agreement") (R. 9. 18, 31); (2) appellant was dismissed from the Company's service on December 2, 1949, for violation of the Company's Transportation Rule "G" (R. 19, 31); (3) Article 58 of the agreement, entitled "Limitation in Presenting Grievances", provides in Section (c), Item 6, that in respect to any claim coming under Article 58, the decision of the highest officer designated by the carrier to handle time claims shall be final and binding unless, within one year from the date of his decision, proceedings for the final disposition of the claim are instituted by the employee (R. 20-21, 33-34); (4) on September 5, 1950, Mr. H. R. Hughes, who was then Assistant General Manager of the Company, and designated as the highest officer of the carrier to handle disputes falling within the purview of Article 58, rendered his written decision denying appellant's claim for reinstatement and pay for time lost since his dismissal, all as provided in Article 58, Section (c), Item 6 (R. 21, 28-29); and (5) no proceedings of the character specified in Item 6 were brought by appellant, either before the National Railroad Adjustment Board (in accordance with Section 3 of the Railway Labor Act, 45 U.S.C. 153), or in court, within the one-year period next following the decision of September 5, 1950, or at all until the commencement of this action on December 22, 1953 (R. 22, 34).

While the summary judgment was based upon the failure of appellant to comply with the agreement provision last referred to, it also affirmatively appears, from the unchallenged facts of record, that this action is barred by the

expiration of the four-year limitation period provided by Section 337 of the California Code of Civil Procedure. Appellant was dismissed on December 2, 1949 (R. 19, 23, 31), and acknowledged his said dismissal the next day (R. 24). Nevertheless, he did not commence his action until December 22, 1953 (R. 3, 13, 22).

Appellees' second motion was duly argued and submitted to the District Court on January 10, 1955. On January 13, 1955, that Court, speaking through Judge Louis E. Goodman, granted the motion, and ordered judgment in favor of appellees, which was duly entered on January 14, 1955 (R. 36-37). Appellant thereupon (January 21, 1955) filed notice of appeal (R. 37).

QUESTIONS PRESENTED

As indicated by appellant in his brief (p. 3), the broad question before this Court upon this appeal is whether, in the light of the applicable principles of law as stated by this Court, the District Court erred in rendering summary judgment in favor of appellees. More precisely, and having in mind the essential allegations of the complaint, the argument in the District Court on the motions for summary judgment, and the appellant's statement of the points to be relied upon, "the specific questions" presented on this appeal are as follows (rather than as appellant has sought to state them: his brief, p. 4):

1. May a former employee maintain an action at law against the employer for alleged unlawful discharge in violation of a collective bargaining agreement, where it affirmatively appears, and is not disputed, that the employee has wholly failed to comply with an express provision of the agreement which, by its terms, is directly applicable to the maintenance of such an action?

2. When the pertinent provisions of a collective bargaining agreement are clear and unambiguous, and their application by the parties to the agreement in similar situations is fully established by undisputed evidence, and there is no dispute as to any material fact, does the trial court err in rendering summary judgment?

3. Did District Judge Goodman commit prejudicial error in granting summary judgment, notwithstanding that another District Judge had denied an earlier motion based upon the same grounds, where it appeared that subsequent to the earlier ruling this Court had rendered a controlling decision?

SUMMARY OF APPELLEES' ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred, and in granting summary judgment upon that basis:

(1) The admitted or unchallenged facts show that appellant wholly failed, in connection with the commencement of this action, to comply with a specific provision, forming a part of the necessary procedural steps set forth in the agreement upon which he relies, as constituting essential requirements to the maintenance for such an action.

(2) The District Court did not, in rendering its summary judgment herein, undertake to determine whether appellant's claim or demand here in suit was a "time claim", as that term is used in the applicable provisions of the collective agreement. Such determination was neither necessary, nor in any sense material, to the judgment appealed from.

B. In the circumstances of this case, and in view of this Court's controlling decision in the *Barker* case, 214 F.2d 918, the District Court did not commit prejudicial error in granting appellees' second motion for summary judgment, notwithstanding that the earlier motion had been denied:

(1) The granting of said second motion was in no sense barred by reason of the denial of the earlier motion:

(2) Even if it could be argued that in the circumstances the second motion might properly have been denied, the undisputed facts show that the granting of said motion was at most a harmless error, and did not result in prejudice to appellant.

ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the applicable time-limit provided in the agreement relied on.

1. THE UNCHALLENGED FACTS SHOW THAT APPELLANT, IN UNDERTAKING TO PROCEED WITH HIS ACTION, FAILED TO COMPLY WITH AN ESSENTIAL REQUIREMENT OF THE AGREEMENT UPON WHICH THE SUIT IS BASED.

As disclosed by the complaint itself (R. 9-10), and fully stated by appellant in his brief (at pp. 2-4), this is an action to recover damages for alleged wrongful discharge, claimed to have been in violation of the collective bargaining agreement between the Company and its employees represented by the Brotherhood of Railroad Trainmen. The record also shows, and again without dispute, that after appellant had been notified by letter dated December 2, 1949, that he had been dismissed from the Company's service (R. 23-24), he and his representatives undertook to handle his claim, designated (R. 27) as a claim "for reinstatement with senior-

ity unimpaired * * * and *compensation for time** lost as result of his dismissal", in accordance with the agreement, particularly the provisions of Article 58 thereof (R. 22-29). Appellant himself declares (his brief, pp. 5-6) that his representatives followed the procedural steps prescribed by Article 58, in handling his claim. The recital of the steps thus followed, appearing in the affidavit of H. E. Eyler in support of appellees' motion for summary judgment (R. 19-20), confirms such handling.

Item 6 of Section (c) of Article 58, which is the portion directly applicable here, is quoted in full in the Eyler affidavit (R. 20-21), and also in part by appellant (brief, p. 5). Compare, also, paragraph 1 of the third separate defense set forth in appellees' answer (R. 33-34), in which the title of the article is shown to be "Limitation in Presenting Grievances", and Item 1 of Section (c) thereof is also quoted. It will be noted that Item 6 in terms provides that the decision of the highest officer designated by the carrier to handle time claims shall be final and binding, unless within one year from the date of said decision proceedings for final disposition are instituted (R. 21, 33).

The undisputed facts also show, and again appellant agrees, that in connection with appellant's claim the final decision of the highest officer designated to handle disputes under Article 58 was rendered on September 5, 1950 (appellant's brief, p. 6). The Eyler affidavit shows (R. 21) that Mr. H. R. Hughes, Assistant General Manager of the Company, who rendered the decision of September 5, 1950 (R. 28-29), was designated as the highest officer to handle disputes falling within the purview of Article 58. He was recognized as such by the General Chairman of the Brother-

*Emphasis in quotations has been supplied, unless otherwise noted.

hood of Railroad Trainmen, who had duly progressed appellant's claim to him (see the General Chairman's letter of May 24, 1950, R. 27-28), after the claim had been denied by the Division Superintendent. In appellant's brief (p. 6), it is stated that Mr. Hughes was "designated as the highest officer to handle disputes under Article 58".

Appellant's suit, based upon the claim made following his discharge on December 2, 1949 (i.e., for loss of past and prospective wages, etc., but omitting the previous demand for reinstatement), was not filed until December 22, 1953, or more than three years and three months after the date of the final decision of the highest officer designated to handle claims coming under Article 58. As appellant himself says (brief, p. 13):

> "Appellant admittedly did not file suit within one year from September 5, 1950, the date of the letter refusing reinstatement from the Assistant General Manager."

There was thus a clear failure on the part of appellant to comply with the express terms of the contract upon which he relies and, indeed, with the express terms of the very article of the agreement which alone may be relied upon as a basis for his action.

The law is well settled in this Circuit, particularly by the controlling decision of this Court in *Barker v. Southern Pacific Co., supra,* that in these circumstances appellant has no subsisting cause of action, and that if the essential facts are made to appear without challenge, a motion for summary judgment should be sustained.

In the *Barker* case, the employee had brought suit for damages for alleged wrongful discharge, in violation of the collective bargaining agreement applicable to his employment. Under that agreement a dismissed employee

was required to present within ten days after dismissal a written request for a hearing; failing in which, as the agreement rule said, "the cause for action shall be deemed to have been abandoned". Summary judgment was rendered upon defendant's motion, and an undisputed showing that timely request for a hearing had not been made. Upon the employee's appeal, this Court said (214 F.2d, p. 919):

> "* * * The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled. Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of contract. *The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.*"

There have been numerous cases in the District Courts in this Circuit, in which the same principles have been applied. In *Buberl v. Southern Pac. Co.,* 94 F.Supp. 11 (N.D.Cal., 1950), the complaint was founded upon the same collective bargaining agreement relied upon in the case at bar. Defendant's motion for summary judgment was granted for two reasons, one of which was stated by the Court as follows (94 F.Supp., p. 12):

> "Judgment must also be for the defendant for another reason. The collective bargaining agreement, and the agreed interpretations thereof, which governed plaintiff's employment, require employees who are dissatisfied with the decision of their Superintendent on any claim respecting employment to notify him of their intention to appeal to the General Manager or his representative. This plaintiff failed to do."

A second case in the same District Court, also involving the same agreement upon which the present suit is based, was *Wallace v. Southern Pac. Co.,* 106 F.Supp. 742 (N.D.

Cal., 1951). In its published findings of fact and conclusions of law, the Court referred to Article 58(c) of the agreement, and the interpretation thereof, and the failure of the employee plaintiff to comply with the requirements stated therein. In Conclusion of Law No. 4 the Court said (106 F. Supp., p. 745):

> "Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any claim or grievance arising from his dismissal on January 23, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Another case, involving again the same agreement, was *Willman v. Southern Pac. Co.* (1948), U.S.D.C., N.D.Cal. N.D., No. 5937. In that case the Court, speaking through Judge Lemmon (now a member of this Court), rendered judgment for defendant, and adopted the following as its third conclusion of law:

> "3. Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any rights arising from his dismissal on June 21, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any grievance, i.e., claim that he was

discharged in violation of the terms of the collective bargaining agreement, and any and all rights which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. That plaintiff's grievance was not presented within the time therein provided."

It will be noted that the Court's conclusion in the later *Wallace* case was practically identical with the corresponding conclusion in the *Willman* case.

Other recent cases in point, decided in the District Courts in this Circuit, include:

Duminie v. Southern Pac. Co. (Jan. 19, 1953), U.S.D.C., N.D.Cal.S.D., No. 30483-Civ.;

Lawrey v. Southern Pac. Co. (Jan. 24, 1953), U.S. D.C., Dist. of Oregon, Civ. No. 6451;

Poe v. Southern Pac. Co. (March 3, 1955), U.S.D.C., Nevada, No. 1105;

Taylor v. Southern Pac. Co. (June 8, 1955), U.S.D.C., N.D.Cal.S.D., No. 31812-Civ.

In the *Duminie* case, the Court said:

"Although plaintiff claims the benefits of one or the other of two collective bargaining agreements, he can not recover thereunder in any event, because of his complete failure to prove compliance with the procedural provisions and express time limitations set forth therein, which provisions are conditions precedent to the assertion of a claim of violation of the agreement; and any and all rights or claims which he may have had as a result of such asserted violation ceased to exist when he failed to present his grievance or claim in accordance with said provisions."

In the *Lawrey* case, the District Court for Oregon said:

"Plaintiff may not assert any rights under the contract between defendant and the Railway Patrolmen's

Union when plaintiff has not complied with the time limitation set forth in the grievance procedure of the contract."

In the *Poe* case, the District Court for Nevada entered summary judgment for the defendant, making findings as follows:

"7. No grievance or claim asserting that plaintiff's dismissal was improper, or in violation of the agreement aforesaid, or that plaintiff was not at fault in respect to said violations of rules and instructions, was filed by plaintiff in writing within the sixty days next following December 17, 1951, or at any other time, at all, as required by Article 25, Section 4(a) of the applicable agreement. Specific compliance with the successive steps set out in the agreement is an essential condition precedent to the prosecution of plaintiff's cause of action.

* * * * * * *

10. Plaintiff failed to institute any proceedings at all before the National Railroad Adjustment Board relating to or including the claim of agreement violation upon which this action is predicated. Plaintiff likewise failed to institute any action or proceeding based upon said claim of agreement violation, in any court or tribunal having jurisdiction, within six months next following either December 17, 1951, or December 5, 1952, or February 10, 1953, or at all until the filing of this action on August 25, 1953. Said claim, or any action based thereon, is and are wholly barred by virtue of the provisions of Article 25, Section 4(c) of said agreement."

In the *Taylor* case, the Court, in entering judgment for the defendant, adopted the following as its Conclusion of Law No. 8:

"8. Plaintiff cannot recover under the applicable collective bargaining agreement, because of his com-

plete failure to comply with the successive steps set out in Article 67 of the Agreement covering conductors, which were essential conditions precedent to the creation and maintenance of his cause of action."

If any doubt still existed as to the principle that an employee who brings an action for unlawful discharge, predicated upon a collective agreement, must show compliance with the terms of that agreement, that doubt was set at rest by the decision of the Supreme Court in *Transcontinental & Western Air, Inc., v. Koppal,* 345 U.S. 653 (June 1, 1953). In that case the Supreme Court cited with approval the decisions in *Harrison v. Pullman Co.,* 68 F.2d 826 (C.A. 8, 1934), and *Reed v. St. Louis S. W. R. Co.,* 95 S.W.2d 887 (Mo. App., 1936). In each of the cited cases, suits by employees for unlawful discharge were dismissed, it having been shown that neither of the employee plaintiffs had complied with the provisions governing the handling of such claims, as set forth in the applicable agreements. The Supreme Court accordingly held that since the law of Missouri required an employee to exhaust the administrative remedies under his employment contract, in order to sustain his cause of action, and it appeared that he had failed to do so, the judgment of the District Court dismissing his complaint must be affirmed. Specifically, the Court said (345 U.S., p. 662):

"* * * Here respondent [the employee] was employed by a carrier subject to * * * the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

Of interest also, as indicating the present state of the law of California in respect to this question, is the decision of the District Court of Appeal for the Second District in *Cone v. Union Oil Co.*, 129 A.C.A. 648, 277 P.2d 464 (Dec. 15, 1954). This was a suit by an employee, based upon an alleged failure of the defendant employer to comply with the terms of a collective bargaining agreement; and it was made to appear, by the affidavit filed by the defendant in support of its motion for summary judgment, that the plaintiff had initiated a grievance, identical in terms with the subject-matter of her complaint, and had pursued the grievance procedure provided for in the agreement, through six of the seven steps therein required. She had failed, however, to comply with the seventh step: namely, the timely initiation of arbitration proceedings leading to final adjudication. In that case (as in the case at bar), defendant's affidavit in support of its motion was not challenged or controverted. The trial court was therefore entitled to accept as true the facts therein stated, to the extent that the person making the affidavit was competent to testify.

The District Court of Appeal held that the trial court had not erred in granting the motion for summary judgment, saying (129 A.C.A., p. 653):

> "* * * Plaintiff, and the union as her collective bargaining agent, have admittedly failed to complete and exhaust such grievance and arbitration procedures. She is therefore precluded from maintaining the present action. It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies."

The basic principle upon which appellees rely is in fact widely recognized. In addition to the cases cited above, the following also are closely in point:

Atlantic Coast Line R. Co. v. Pope, 119 F.2d 39 (C. C.A. 4, 1941);

Davis v. Union Pac. R. Co. (1952), U.S.D.C., Dist. of Nebraska, Omaha Div., Civ. No. 86-50, 21 C.C.H. Labor Cases, Par. 66,834;

United R. Workers v. Atchison, T. & S.F.Ry. Co., 89 F.Supp. 666 (U.S.D.C. Ill., 1950);

Youmans v. Charleston & W.C.Ry. Co., 175 S.C. 99, 178 S.E. 671 (1935);

McGlohn v. Gulf & S.I.R., 179 Miss. 396, 174 So. 250 (1937);

Division of Labor Law Enforcement, Dept. of Industrial Relations, State of California, v. Pacific Elec. Ry. Co. (1952), Superior Court of California, Appellate Dept., L. A. County, No. Civ. A-7962; 22 C.C.H. Lab.Cases, Par. 67,244;

Crow v. Southern Ry. Co., 66 Ga.Ap. 608, 18 S.E.2d 690 (1942);

Hornsby v. Southern Ry. Co., 70 Ga.Ap. 467, 28 S.E.2d 542 (1944).

In his brief (at p. 12) appellant concedes that this Court in *Barker v. Southern Pac. Co., supra,* has held "that administrative remedies must be exhausted prior to recourse to the courts"; but argues in effect that this rule (of the necessity of compliance with the contract in suit) applies only to the *administrative remedies* set up *in the contract,* and not to the subsequent step of resorting to suit within the time-limit provided by the contract. In other words, appellant contends that he has "exhausted"

the "*administrative* remedies" required by his contract, in progressing his claim for reinstatement (with pay for time lost) up to and including the final denial by the highest officer designated to handle such claims; that by reason of such compliance, he is excused from further compliance with the remaining requirement of the same article and section of the contract, requiring that a suit be commenced within one year from final decision. This is because, so appellant says, the filing of suit is not an *administrative* remedy, there being no *administrative* steps to be taken by appellant after the highest officer's final decision.

Further to support his argument, appellant also says, in effect, that the decision by Assistant General Manager Hughes dated September 5, 1950, and which appellant himself has treated as final, was not in fact a decision by the highest officer of the Company designated to handle *time claims;* and that therefore, presumably, the one-year period never started to run. No attempt is made to explain how a decision by the Company's officer can be a final decision closing out the administrative process, and permitting the filing of suit, and at the same time not a final decision sufficient to start the running of the one-year period. The question presented by appellant's reliance upon the phrase "time claims" is discussed in more detail in the next subdivision of this argument.

As stated, appellant cites no authority for his apparent argument that compliance with the one-year period for the filing of suit is excluded from the general scope of the cited decisions, upholding the principle that an employee who sues in California upon a collective agreement must show that he has complied with all of the necessary steps provided for in the agreement as preliminaries to suit. We are confident that no such authority is available.

Certainly the one-year time-limit for the filing of suit is just as much an essential and integral part of the contract, as are any other of the time-limits provided in the same contract. Compliance with these other limitations was held to be necessary in the *Buberl, Wallace* and *Willman* cases, cited above.

No persuasive reason is suggested by appellant why a distinction should be made. There are, however, both persuasive reasons, and controlling authority, for concluding that each and all of these time-limits should be considered as coming within the same general principle. From this standpoint, the instant case is on all fours with *Gifford v. Travelers Protective Ass'n,* 153 F.2d 209 (C.A. 9, 1946). This was a suit upon an insurance contract, which contained a provision to the effect that if the insurer declined a claim, the period for commencement of suit should be limited to six months from the date of such declination. The defendant insurer moved for summary judgment, upon the ground that the six-month limitation had not been complied with. This motion was sustained by District Judge Goodman of the District Court for the Northern District of California. Upon appeal by the claimant, this Court said (153 F.2d, p. 211):

> "In this case the trial court determined upon the record before it that the plaintiff's suit had been barred by the running of the period of limitations stipulated in the insurance contract, and that there was no genuine issue of any material fact to be determined. There is nothing before this court to justify a reversal of that judgment. Indeed, the trial court delayed its final judgment to give plaintiff an opportunity 'to plead by way of replication any pertinent facts in avoidance of the time limitation.' By failing to avail himself of this opportunity, plaintiff in effect admitted the facts al-

leged in the affidavit supporting the motion for summary judgment and left the trial court no alternative. [Citing cases.]"

In holding that the time limit provided by the contract was valid and enforceable against the claimant, this Court said further (at p. 211):

"The certificate of insurance under which appellant claims his rights as beneficiary provided that the Constitution and By-Laws shall constitute the agreement between the member and the association, shall govern the payment of benefits, and 'shall bind said member and his beneficiary or beneficiaries.' How can appellant hope to avoid his responsibilities which are imposed by the same agreement which assures the benefits he seeks in this action?

That an insurer may limit by contract the time within which suit may be brought on the policy has been settled in this jurisdiction (Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 138, 99 P. 501) and by the Supreme Court of the United States. Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 19 L.Ed. 257. Under the California law, a contract may fix the time within which a suit may be brought, whether it be a shorter or longer period than that of the Statute."

The conclusions of this Court in the *Gifford* case completely dispose of any suggestion by appellant that he may avoid the one-year period of limitation upon the ground that technically the filing of suit is not one of the "so-called administrative remedies" provided in the contract. The appellant in the cited case adopted exactly that position; for he alleged, and it was not denied, that he had given due notice to the insurer, as required by the contract, and had been refused payment (thus establishing his compliance with the "administrative" provisions), but claimed

that the time-limitation upon the filing of suit did not apply.

Furthermore, the broad principle of the *Koppal* and *Barker* cases, the numerous decisions of the District Courts of this Circuit, and the other courts which have either anticipated or followed those decisions, requires that the one-year limitation be given effect in the present case. As we read the *Barker* case, and the *Wallace* case which this Court cited therein with apparent approval, the Court was persuaded to its decision upholding the time-limitation in the contaret there in suit, not solely because the giving of the notice therein referred to was a part of the administrative procedure, but because the contract requirement was reasonable, and the aggrieved employee was able readily to comply and should have complied. In short, the provision there sustained was a part of the entire body of the contract upon which the claimant relied, and with which he must comply in order to maintain his action. It was immaterial whether such failure occurred at an initial stage, as in the *Barker* case (immediately after discharge), or during the course of the handling leading to final decision by the delegated highest officer (as in the *Wallace, Willman* and *Buberl* cases), or at the final stage after the intervening procedure had been carried out, as in *Cone v. Union Oil Co.,* the *Gifford* case, and the present case. The essential point is that in all these cases the contracts in suit provided remedies which the claimants were able to pursue to final adjudication by competent tribunals, provided only that in so doing they exercised reasonable diligence, and asserted their claims at successive stages in accordance with the specific time-limits provided in the contracts.

We therefore ask the Court to conclude that since it appears without dispute, and indeed is openly admitted,

that appellant did not commence his action within one year from the date of the final decision denying his claim, rendered by the highest officer of the Company to whom the claim had been duly progressed and presented, the action is wholly barred by the express terms of Item 6 of Section (c) of Article 58 of the agreement upon which the suit is based.

2. THE DISTRICT COURT DID NOT UNDERTAKE TO DETERMINE WHETHER APPELLANT'S CLAIM HERE IN SUIT WAS OR WAS NOT A "TIME CLAIM", AS THAT TERM IS USED IN THE AGREEMENT. SUCH DETERMINATION WAS NEITHER NECESSARY, NOR EVEN MATERIAL, TO THE JUDGMENT APPEALED FROM.

We now address our discussion to that portion of appellant's argument (his brief, pp. 13-14) in which he refers to the use of the term "time claims", in the text of Item 6 of Section (c) of Article 58 (quoted at R. 20-21).

As already noted, it is apparently appellant's position that the final decision of Assistant General Manager Hughes, dated September 5, 1950 (R. 28-29), was not a decision by the highest officer designated by the carrier to handle *time claims*; or, in the alternative (his brief, pp. 7-8), that the one-year limitation in Item 6 applies only to "time claims", and therefore does not apply to appellant's present claim.

Appellant appears also to argue that when the District Court held that the one-year time-limit is applicable to his claim, it necessarily undertook to interpret the phrase "time claims"; and that in so doing the Court decided an issue of *fact,* concerning which no evidence was offered or received. It is asserted that this factual determination was essential and material to the granting of the summary judgment, and that the District Court's was therefore erroneous.

There is no basis for either or any of the contentions thus advanced or suggested by appellant. It was not neces-

sary for the District Court to determine whether appellant's claim was a "time claim"; and it is quite clear that no such determination was made. (In passing, it may be remarked that the demand, as originally presented by appellant through his local chairman and subsequently progressed to the Assistant General Manager by his general chairman, was "for reinstatement with seniority unimpaired, and *claim for compensation for time lost* as a result of his dismissal from the service" (R. 27). As set forth in the complaint (R. 10), the claim was for lost *wages* for an indefinite period of *time,* and for the value of certain other alleged benefits, all interwoven with the wage-claim; the demand for reinstatement having been abandoned.)

In the first place, as emphasized before, appellant's demand, throughout its handling with the Company's officers, was treated as a claim or grievance coming within the scope of Article 58. That article is headed: "Limitation in Presenting Grievances" (R. 20). In the *Wallace* and *Willman* cases, the term "grievance" is used interchangeably with the word "claim"; and compare, also, the *Cone* and *Poe* cases. It is affirmatively shown, without any challenge (R. 21), that Assistant General Manager Hughes, who made the decision of September 5, 1950, was "designated as the highest officer to handle disputes falling within the purview of Article 58". In his brief (at p. 6), appellant asserts that this was the fact, and relies upon the passage above quoted from the Eyler affidavit. Thus it is apparent that whether or not appellant's demand is a "time claim", within the meaning of that phrase as used in Item 6, Assistant General Manager Hughes was the highest officer delegated by the Company to handle time claims and all other claims (if any) coming within the purview of Article 58, and that his decision dated September 5, 1950, was a

final decision by the highest officer designated to handle such time claims.

Appellant's attempt to confine the one-year limitation to time claims is completely unsupported, in view of the language of Item 6. The only mention of time claims in the item is in connection with the phrase "highest officer designated by the carrier". It is apparent that the entire phrase, "highest officer designated by the carrier *to handle time claims*", is not a limitation upon the powers of that officer, or the scope of his handling, but merely an identification of the particular officer who may make the final decision on behalf of the carrier. The judges of this Court, like the judges of the District Court, are well aware, and indeed may take judicial notice, of the fact that many types of claims are made by individuals against a large railroad company. These may and do include: (1) claims for damage to freight; (2) claims for overcharges, i.e., that the Company has collected more than the proper transportation charges; (3) claims for personal injury made by employees, passengers, and members of the public; (4) claims for additional wage payments; (5) claims for additional vacation allowances; (6) claims for infringement of patent rights; and, occasionally, (7) claims for trespass or infringement upon real property rights. Each of these several types of claims usually falls within the jurisdiction of a separate department, and is finally passed upon by an officer of that department duly delegated to perform that function. The obvious and necessary purpose of identifying the officer having final jurisdiction to pass upon time claims was to distinguish him from other officers of the Company having equally final jurisdiction with respect to the various other types of claims confronting the Company.

There is no support at all for the suggestion that the highest officer designated to handle time claims may not or cannot pass upon any other type of claim coming within the purview of Article 58. It is of particular significance that neither appellant, nor the officers of the Trainmen's Brotherhood who represented him in the handling up to and including the Assistant General Manager, had any question in their minds but that appellant's claim, whether or not it was a "time claim", was within the class of claims properly to be presented to, and finally passed upon by, the Assistant General Manager who rendered the decision of September 5, 1950.

Appellant suggests that there is no evidence to support the conclusion that Mr. Hughes, the Assistant General Manager, was the highest officer designated by the carrier to handle time claims, and asserts that the so-called "interpretation" in the concluding paragraph of the Eyler affidavit (R. 22) was "admittedly inadmissible". Appellees have never admitted that the Eyler "interpretation" was "inadmissible", as contended by appellant; at most, they have only agreed with the comment that the paragraph thereof reproduced at R. 22, which undertakes to describe the application of Item 6, might for the purposes of this case be regarded as surplusage, if such should be necessary in order to avoid any suggestion of a factual issue. However, appellees consider that this paragraph is nothing more than a statement of the correct and consistently observed application of the language in question, rather than an expression of opinion. The statement is certainly not incompetent, for Mr. Eyler is shown by the first and second paragraphs of his affidavit (R. 18) to be fully qualified to testify respecting this subject-matter.

Furthermore, appellant is in no position to challenge the Eyler statement at R. 22, because he has never undertaken to file any opposing affidavit, although afforded at least two opportunities to do so. Appellant is in the same position as the plaintiff-appellant in the *Gifford* case, *supra* (153 F.2d 209), in which this Court said, in language already quoted:

> "* * * By failing to avail himself of this opportunity, plaintiff in effect admitted the facts alleged in the affidavit supporting the motion for summary judgment and left the trial court no alternative. [Citing cases.] Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result. [Citation.]"

While the statement in the Eyler affidavit with respect to the correct application of Item 6 was both competent and material, it was not necessary to an interpretation of that item by the District Court. The language in question is plain, easily understood, and not at all ambiguous or uncertain, or of such technical character as to require the aid of expert evidence. In these circumstances, the interpretation to be given to the section, or any portion thereof, presents solely a question of law, to be decided by the trial court. 3 *Williston on Contracts*, Sect. 616; 53 *Amer. Juris.*, Sect. 266, and cases cited; *11 C.J.S., Contracts"*, Sect. 616; *Kress v. Fisher*, 65 F.2d 682, 683 (C.A. 4, 1933); *U. S. v. Lundstrom*, 139 F.2d 792, 795 (C.A. 9, 1943); *Moore v. Scott, etc., Co.*, 178 F.2d 3, 5 (C.A. 2, 1949); *Tobin Quarries v. Central Nebraska District*, 64 F. Supp. 200, 210-211

(U.S.D.C., Nebr., 1946; affirmed, 157 F.2d 483), and cases cited.

In this section of his argument (his brief, pp. 13-14) appellant also asserts that the District Court erred in failing to make findings of fact and conclusions of law in connection with the summary judgment herein, and cites *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.,* 181 F.2d 341 (C.A. 5, 1950). The general rule has long been recognized that the Court need not make findings of fact and conclusions of law where summary judgment is rendered under Rule 56; although of course the court *may* do so, *at its option,* or if requested. *Lindsey v. Leary,* 149 F.2d 899 (C.A. 9, 1945); *United States v. Board of Com'rs,* 53 F. Supp. 395 (D.C. Wyo., 1943); *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.,* 2 F.R.D. 355 (D.C. Ky., 1942); *Dulansky v. Iowa-Illinois Gas & Elec. Co.,* 191 F.2d 881 (C.A. 8, 1951); *Simpson Bros. v. District of Columbia,* 179 F.2d 430 (C.A. D.C., 1949); *Burnham Chemical Co. v. Borax Consolidated,* 170 F.2d 569 (C.A. 9, 1948). Indeed, Rule 52(a) of the Rules of Civil Procedure was amended in 1946 to include the following specific provision:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or *56* or any other motion except as provided in Rule 41(b)."

It is true that the *Winter Park* case, *supra,* appears to present an exception to the general rule: but a study of the opinion indicates that the Court was confronted with a special situation, involving a series of rather complicated questions. The opinion recites six such questions, as to which, as the Court said, a satisfactory solution of the case necessarily involved the drawing of factual deductions. In the case at bar, no corresponding situation is shown. In-

stead, as appellant correctly indicates (brief, pp. 13-14) here there is "no material dispute" as to the actuality of the facts; and appellant does not contend, or even seriously suggest, that inconsistent hypotheses might reasonably be drawn from the unchallenged facts. It follows that the District ourt did not err in following the general rule.

This Court should conclude that it was unnecessary for the District Court to determine, and it did not undertake to determine, whether the appellant's claim here in suit was or was not a "time claim"; and further, that if such determination was in any respect material to the disposition of this cause by summary judgment, the District Court was competent to make such determination as a matter of law, no factual question being involved.

B. In the circumstances here disclosed, the District Court did not commit prejudicial error in granting appellees' second motion for summary judgment, notwithstanding that their earlier motion had been denied.

1. THE GRANTING OF THE SECOND MOTION WAS NOT BARRED BY THE FACT THAT THE EARLIER MOTION HAD BEEN DENIED.

An order denying a motion for summary judgment is interlocutory in character, and not *res judicata. Fraser v. Doing,* 130 F.2d 617 (1942); *Kliaguine v. Jerome,* 91 F. Supp. 809 (D.C.E.D.N.Y., 1950), 6 *Moore's Federal Practice, 2nd Ed.,* 2099. The District Court had power, at any time prior to entry of final judgment, to reconsider any action previously taken, and to reopen any part of the case. *Marconi Wireless Co. v. U. S.,* 320 U.S. 1, 47 (1942); *Simmons Co. v. Grier Bros. Co.,* 258 U.S. 82, 88 (1921).

The cases cited by appellant (his brief, p. 9) do not deal with the question whether a District Court has power to reconsider its prior interlocutory ruling. In *Collord v. Reconstruction Finance Corp.,* 103 F. Supp. 794 (U.S.D.C.W.D.

Pa., 1952), the question was as to the effect of the denial of a prior motion to dismiss upon a subsequent motion for summary judgment. The Court held that it would not exercise its *discretionary* power to re-examine the earlier ruling; saying (at p. 795):

> "However, this difference (between the tests on motion to dismiss and on motion for summary judgment) neither authorizes nor requires a re-examination of Judge Marsh's decision."

It is apparent that in the *Collord* case no good reason was shown to warrant reconsideration; whereas, in the instant case the District Court was faced with an intervening controlling decision, clearly opposed in principle to the earlier ruling.

Similarly, in *Garden City Chamber of Commerce, Inc. v. Wagner,* 104 F. Supp. 235 (U.S.D.C.E.D.N.Y., 1952), the Court said (p. 236):

> "The law of the case has been settled *and no occasion is presented for going over the same ground a second time.*"

Here the "law of the case" (if the earlier ruling be so regarded) was not "settled" until the *Barker* decision, rendered after the first ruling was made, and was then settled in a manner wholly inconsistent with that ruling.

The District Court has broad discretion with respect to motions for summary judgment. In 6 *Moore's Federal Practice, 2nd Ed.,* at page 2045, it is said that a trial court, "*when it has denied an earlier motion, may permit a subsequent motion where good cause is shown in support of the renewed motion.*" At page 2099, the same authority states further:

> "And if good reason is shown why the prior ruling is no longer applicable or for some other reason should

be departed from, the court can and should entertain a renewed motion for summary judgment in the interest of effective judicial administration."

In the present case the "good reason" why the "prior ruling should be departed from" was afforded by this Court's intervening decision in the *Barker* case. While that decision did not "change the law" applicable to cases of this type, and was not held by the District Court to have done so (as appellant seems to believe: his brief, p. 10), it obviously operated to clarify the law in this circuit, and in particular to provide a controlling statement of the essential principle, which the District Courts were bound to follow. Since *Barker* was clearly inconsistent with the prior ruling in the present case, there was not only "good reason", but in fact the best of reasons, why the motion should be renewed so that the prior ruling might be corrected.

The *Barker* decision was indeed the first appellate decision by any Court, in which the principle enunciated by the Supreme Court in the *Koppal* case, (*Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653) was considered and applied. Prior to *Barker,* there had been a number of lower court decisions, including that of the Court of Appeals in the *Koppal* case (119 F.2d 117, C.A. 8, 1952) in which a contrary rule had prevailed; e.g., *Moore v. Illinois Central R. Co.,* 180 Miss. 276, 176 So. 593, 24 F. Supp. 731, 112 F.2d 959, 136 F.2d 412; *Texas & N. O. R. Co. v. McComb,* 143 Tex. 257, 183 S.W. 2d 716. The *Moore* case had been often cited in support of the contention that even though the employment contract conforms to the policy of the Railway Labor Act, in providing a procedure for handling grievances, an employee need not comply with the procedure in the contract if he elects to sue upon the contract in court. This misconception was eliminated by

the Supreme Court in the *Koppal* case. Thereafter, this Court, in the *Barker* case, held that the law of California requires that a dismissed employee, who sues in this state upon a collective bargaining contract, must show that he has complied with the contract provisions relating to the handling of his claim.

In this state of the case, it was not only appropriate that appellees should renew their motion for summary judgment; in a broad sense, it was their obligation to do so. If they had failed, they and their counsel might properly have been criticized for allowing a case to remain on the trial calendar, and perhaps go to actual trial, when clearly that case could and should be disposed of by summary procedure. In any event, it is certain that the District Court did not lack judicial power to reconsider and correct its prior ruling, and that in so doing, it did not exceed the bounds of judicial discretion. In fact, the District Court was in duty bound to recognize the principle then recently declared by this Court in *Barker,* and to render summary judgment for appellees accordingly.

2. EVEN ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE BETTER PRACTICE WOULD HAVE BEEN TO HAVE DENIED APPELLEES' SECOND MOTION, IT IS NEVERTHELESS APPARENT THAT THE GRANTING OF SAID MOTION WAS, AT MOST, HARMLESS ERROR.

Although, as above indicated, appellant asserts as one of his principal specifications of error that the District Court should not have considered or granted appellees' second motion for summary judgment, and argues at length in support of that general proposition (brief, pp. 8-10), he nowhere asserts or shows that the alleged error actually operated to his prejudice. In fact, the so-called error was completely harmless, since it did not result in any disposition of the case other than would have occurred if the

motion had been denied. It follows that the supposed error affords no ground for the reversal of the judgment.

It has been shown, both in the foregoing discussion and by reference to appellant's brief (pp. 12-13), that there is no substantial dispute as to the essential facts bearing upon appellant's ability to maintain this action. Appellant has admitted that his claim of wrongful discharge and consequent damages was handled by his representatives in accordance with Article 58, and apparently concedes that it was properly so handled. Indeed, appellant must agree that his claim or grievance was within the provisions of Article 58, and properly handled thereunder, if he is to assert any cause of action at all. The *Barker* decision, and the numerous other cases above cited, are ample authority to support this conclusion.

As establishing further the lack of any conflict or dispute as to the facts, it may be noted that none of the statements in the Eyler affidavit have ever been challenged by appellant; nor has he ever suggested that any additional facts bearing upon the handling of his claim could or should be brought to the attention of the Court.

The situation is thus that if the second motion had been denied, and the case had thereafter gone to trial, appellant could not possibly have shown that he had complied with the one-year limitation. He could only have contended, as he now does in his brief (at pp. 7-8), that because of certain language in Item 6 of Article 58, the one-year limitation was not applicable to his particular claim. That contention would not present a question of fact, but solely and simply a question of law: i.e., what shall be the construction given to the plain and unambiguous language of the contract provision in question? It is noteworthy that appellant has cited no authorities to support his position that the inter-

pretation and application of this simple agreement provision presents a question of fact. As we have shown, the uniform current of the controlling authorities is to the contrary: compare the decision in the *Tobin Quarries* case, *supra* (64 F. Supp. 200), and the authorities cited at pp. 210-211 of that opinion.

In these circumstances, there being no dispute as to any material fact, and a recent controlling decision by this Court upon the substantive legal issue presented, how can it be reasonably argued that appellant has suffered prejudice because summary judgment was rendered against him under Rule 56? If the case had gone to trial, appellant's own evidence in chief would have unavoidably developed exactly the same facts in respect to the nature of his claim, the handling thereof under Article 58, and the date and content of the final decision of the Company's highest officer, which were before the Court when the motion for summary judgment was granted. His evidence would also develop his failure to bring his action within one year from the date of that final decision. The position of the parties would thus be the same as when the second motion was granted. In the light of the *Barker* case, the trial court would have been bound to grant a motion either to dismiss under Rule 41(b), or for a directed verdict under Rule 50(a), whichever was appropriate; and judgment in favor of appellees would have followed accordingly.

It should also be noted that if appellant is correct in his contention that the one-year limitation, provided in Item 6, does not apply to his action, he must equally agree that the intermediate handling of his claim with the Company's officers, which led up to the final decision of September 5, 1950, did not operate to toll the statute of limitations otherwise applicable to his cause of action. Appellant was

in fact dismissed from the Company's service by letter dated December 2, 1949 (R. 23), which he acknowledged in writing on December 3, 1949 (R. 24). In his reply appellant admitted that he had been advised that he was "dismissed from the service of the Southern Pacific Co." Lest there be any doubt on the matter, both of the Local Chairmen who represented appellant also considered that he had been dismissed on December 2, 1949 (see their successive letters dated December 3, 1949, R. 23-24, and April 19, 1950, R. 24-25). This was also the opinion of the General Chairman of appellant's organization. By letter dated May 24, 1950 (R. 27), the General Chairman referred to appellant's "dismissal from the service, December 2, 1949, for alleged violation of Rule G."

Unless appellant's claim was properly within the scope of Article 58, including Item 6, it was subject to the provisions of the California statute of limitations applicable to an action founded upon a contract in writing. Sections 335 and 337 of the California Code of Civil Procedure provide that the period for the commencement of such an action shall be four years. In this case the four-year period started to run on December 3, 1949, and expired on December 2, 1953; whereas appellant's suit was not brought until December 22, 1953.

It is submitted that appellant is in no position to assert prejudicial error, because the District Court rendered the same decision, upon motion for summary judgment, which that Court would have been in duty bound to render upon appropriate motion based upon the same undisputed facts, in the event the case had been permitted to go to trial.

CONCLUSION

This appeal is in fact nothing more than an attempt to employ highly technical arguments in order to avoid the application of the principle conclusively established by the *Koppal* and *Barker* decisions.

It is significant that since 1950, there have been at least eight cases, seven in the District Courts of this Circuit and one in the California Superior Court, in which the essential question was the same as in the case at bar. Six of these cases were disposed of by summary judgments for the defendants. Two went to trial, and upon the facts the same results were reached. Decisions in other circuits and other jurisdictions have followed the same principle. The consistent course of the decisions in both the trial courts and the appellate courts establishes that the appellants' arguments in this case are untenable, and that the summary judgment entered herein was the proper disposition of the case. No useful purpose would be served by permitting the case to go to trial for, upon the undisputed facts, it is clear that appellant cannot recover, as a matter of law.

It follows that the judgment appealed from should be affirmed.

Respectfully submitted,

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Dated at San Francisco, June 28, 1955.